

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY C. TYLER	:	CIVIL ACTION
	:	
v.	:	
	:	
GEORGE M. O'NEILL, et al.	:	NO. 97-3353

**MEMORANDUM ORDER**

THOMAS J. RUETER  
United States Magistrate Judge

October 6, 1998

Presently before the court are the following post-trial motions: (1) defendants' motion for judgment as a matter of law and to vacate, alter or amend judgment (Document No. 92); (2) plaintiff's motion for judgment notwithstanding the verdict or, in the alternative, for new trial against Michelenia O'Neill on the issue of damages only (Document No. 94); and (3) plaintiff's application for appointment of custodian and receiver for Wm. M. Hendrickson, Inc. (Document No. 95.)

Defendants George O'Neill and Michelenia O'Neill filed a motion for judgment as a matter of law and to vacate, alter or amend judgment. (Document No. 92). The jury determined that the O'Neills individually were liable for breach of fiduciary duty and fraud to plaintiff, but not liable on the derivative claims or to plaintiff for violation of RICO or conspiracy to violate RICO. (Jury Interrogatories ("Jury Int.") Question Nos. 1-4, 6-7.) The jury also found that plaintiff should have discovered the harm due to the conduct of the O'Neills which formed the basis of the action by March, 1991. (Jury Int. Amended Question No. 5.) In their motion, the O'Neills argue that since the statute of limitations for fraud and

breach of fiduciary duty is two years and this action was commenced on May 12, 1997, the causes of action on which plaintiff prevailed are time barred. (Defs.' Mot. for Jmt. at 2-3.)

Defendants filed their motion on June 15, 1998. This court entered an Order dated August 11, 1998 which stated in pertinent part the following:

the court having received the following post-trial motions, (Document Nos. 92, 94, 95), and responses thereto, and it further appearing that neither party has complied with Local Rule of Civil Procedure 7.1(e), it is hereby **ORDERED** that the parties shall comply with all terms of the rule by August 18, 1998; otherwise the motions will be dismissed for lack of prosecution.

Tyler v. O'Neill, No. 97-3353, Order (E.D.Pa. August 11, 1998) (footnote omitted). At that time, the docket revealed that the parties had ordered portions of the trial transcripts, but not the complete trial transcript. Local Rule of Civil Procedure 7.1(e) provides as follows:

(e) Within fourteen (14) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial by a writing delivered to the Court Reporter Supervisor, or (b) file a verified motion showing good cause to be excused from the requirement. Unless a transcript is thus ordered, or the movant excused from ordering a transcript, the post-trial motion may be dismissed for lack of prosecution.

On August 14, 1998, plaintiff filed an emergency motion to be excused from complying with Local Rule of Civil Procedure 7.1(e) (Document No. 110) arguing that plaintiff's motions are "in the nature of cross-motions" to defendants' motion, and that if defendants do not order the trial transcript, "Plaintiff will withdraw his motions and stand on the judgment as entered." (Pl.'s Emergency Mot. at ¶¶5, 6.) By letter dated August 17, 1998, defendants' counsel ordered the trial transcript. By Order dated August 18, 1998, this court granted plaintiff's emergency motion to be excused from complying with Local Rule 7.1(e), since the defendants had already ordered the trial transcript. Tyler v. O'Neill, No. 97-3353,

Order (E.D. Pa. August 18, 1998). By letter dated September 19, 1998, the Supervisor of Court Reporting for the Eastern District of Pennsylvania referred to a prior conversation and informed defendants' counsel that payment of the total estimated cost is required before transcription is started. This letter provided defendants' counsel with the estimated costs of transcription and to whom he should remit checks or money orders. As of October 5, 1998, defendants have not paid the estimated costs and transcription has not begun.

In accordance with Local Rule of Civil Procedure 7.1(e), defendants' motion for judgment as a matter of law and to vacate, alter or amend judgment (Document No. 92) is dismissed for lack of prosecution. Pursuant to plaintiff's representations in his emergency motion, plaintiff will withdraw his two motions which are, therefore, denied.

Because this court granted plaintiff's emergency motion excusing him from complying with Local Rule of Civil Procedure 7.1(e), this court feels compelled to review the merits of plaintiff's motions, even though plaintiff previously told the court he would withdraw the motions should defendants not order the transcript. Having reviewed plaintiff's motions, the court denies them on their merits. In his motion for judgment notwithstanding the verdict or, in the alternative, for a new trial against Michelenia O'Neill on the issue of damages only (Document No. 94), plaintiff alleges that the verdict of the jury is inconsistent because the jury found Michelenia O'Neill liable to plaintiff for fraud and breach of fiduciary duty, but awarded no damages to plaintiff against Mrs. O'Neill. Plaintiff requests this court to either grant an additur to the plaintiff or grant a new trial on the issue of damages against Mrs. O'Neill.

It is well established that when considering a claim that a jury verdict is inconsistent, the court must read the verdict in a manner that will resolve inconsistencies.

Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 119 (1963); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 364 (1962); Mosley v. Wilson, 102 F.3d 85, 90 (3d Cir. 1996). After careful review of the jury's answer to the interrogatories, and the entire record, this court concludes that the jury's answers to the interrogatories are not inconsistent. In its interrogatories, the jury found both Mr. and Mrs. O'Neill liable to plaintiff for fraud and breach of fiduciary duty, and found that the amount of \$225,000 was an award sufficient to compensate plaintiff for his injuries. It was entirely within the jury's discretion to impose the burden of compensating plaintiff for his injuries on Mr. O'Neill rather than his wife. See Gentile v. County of Suffolk, 926 F.2d 142, 154 (2d Cir. 1991). The verdict makes sense since Mrs. O'Neill was only an uncompensated employee of the business of Wm. M. Hendrickson, Inc., and was not an officer, director or shareholder of the business. It was Mr. O'Neill who headed the company and oversaw its day-to-day operations. Finding that Mr. O'Neill should pay for the damages, as opposed to Mrs. O'Neill, is not inconsistent but shows thoughtfulness and judgment on the part of the jury.

Plaintiff's request for additur must be denied since in federal court the granting of an additur would violate the defendants' Seventh Amendment right to a trial by jury. See Dimick v. Scheidt, 293 U.S. 474, 486-87 (1935); Gentile, 926 F.2d at 155; Calloway v. Hobart Corp., 1993 WL 172898, at \*6 (E.D.Pa. May 18, 1993). Even if this court did have the authority to grant the additur, the court will not grant the request here for the reasons stated above.

This court also denies plaintiff's application for appointment of custodian and receiver for Wm. M. Hendrickson and to involuntarily sell or dissolve the corporation

(Document No. 95) on the merits. The court has discretion to appoint a custodian or receiver and to order the dissolution of a corporation under 15 Pa. Cons. Stat. Ann. §§1767 and 1981 (West 1995). This remedy, however, is a drastic one to be applied cautiously and only in clear cases. See Stainton v. Trantino, 637 F.Supp. 1051, 1072 (E.D.Pa. 1986) (The “court should exercise its power to appoint a receiver ‘sparingly, with caution and circumspection, and only in an extreme case under extraordinary circumstances, or under such circumstances as demand or require summary relief.’”) (quoting Hankin v. Hankin, 507 Pa. 603, 608, 493 A.2d 675 (1985)). See also Cerami v. Dignazio, 283 Pa.Super. 424, 439, 424 A.2d 881, 889 (1980) (the remedy provided in 15 Pa. Cons. Stat. Ann. §1981 should be applied only in extreme circumstances). In the instant matter, no circumstances exist which warrant the court to invoke such a drastic and extraordinary remedy. There are no substantiated allegations of present waste, mismanagement, fraud, or dissipation. Allegations of ongoing misconduct and statements concerning “threats” by a bank and an “investigation” by one of the corporation’s customers by plaintiff in his reply brief (Pl.’s Reply Brief at 8), do not establish such extraordinary circumstances as to warrant the appointment of a custodian and receiver and dissolution of the corporation. Accordingly, plaintiff’s application for appointment of a receiver is denied.

For all of the foregoing reasons, it is hereby

**ORDERED**

1. Defendants' motion for judgment as a matter of law and to vacate, alter or amend judgment (Document No. 92) is **DISMISSED** for lack of prosecution;

2. Plaintiff's motion for judgment notwithstanding the verdict or, in the alternative, for new trial against Michelenia O'Neill on the issue of damages only (Document No. 94) is **DENIED**; and

3. Plaintiff's application for appointment of custodian and receiver for Wm. M. Hendrickson, Inc. (Document No. 95) is **DENIED**.

BY THE COURT:

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THOMAS J. RUETER  
United States Magistrate Judge